Nos. 87-826, 87-1101

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JEROME F. GOLDBERG AND ROBERT MCTIGUE,
Appellants,
v.
ROGER D. SWEET, DIRECTOR OF THE ILLINOIS DEPARTMENT OF REVENUE, *et al.*,
Appellees.

GTE SPRINT COMMUNICATIONS CORPORATION,
Appellant,
v.
ROGER D. SWEET, DIRECTOR OF THE ILLINOIS DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Illinois

REPLY BRIEF FOR APPELLANTS GOLDBERG AND McTIGUE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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ARGUMENT

1. Fair Apportionment

a. The linchpin of the State's fair apportionment argument is the proposition that taxing 100% of some interstate calls and 0% of others reflects a legislative apportionment formula.[1] But this "formula" is simply a

[1] In this reply, we cite the Consolidated Brief for Appellees as "State Br.," the Brief of Amicus Curiae MCI Telecommunications

recent invention of appellate counsel;[2] the decision to tax 100% of the calls here at issue was certainly *not* part of a *legislative* apportionment scheme. There is nothing anywhere in the statute, its legislative history, or the record indicating that the legislature chose to tax the whole of Illinois-charged calls and none of non-Illinois-charged calls in order fairly to apportion its tax. Rather, as the Supreme Court of Illinois expressly determined, the legislature found that "the ties to the State and benefits derived from the State" were "substantial" as to the Illinois-charged calls but "minimal" as to all others; accordingly, the legislature chose to tax the former but not

Corporation as "MCI Br.," and the Brief of Amici Curiae National Conference of State Legislatures, *et al.*, as "NC Br." In addition, we cite our own brief on the merits as "Goldberg Br."

[2] Thus, both in its own motion for summary judgment and in its opposition to plaintiffs' motion for summary judgment, the State took the position that the tax was "not in need of apportionment" because it was levied solely on a local event. State's Memorandum in Support of its Motion for Summary Judgment at 15. The State therefore contended that "apportionment is not an issue." State's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 6, 11, 14. Now, before this Court, the State contends not only that the legislature has in fact apportioned the tax but that a more finely-tuned apportionment would be impossible, and further that plaintiffs failed in their burden to prove at trial that the State's formula produces disproportionate results and that a call-by-call apportionment is feasible. While we believe this new argument can easily be rejected on its merits (see pp. 4-7, 11-15 below), we do not believe the Court should consider it. *See, e.g., Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980) (declining to address issue raised by respondent because "[o]rdinarily, we will not consider a claim that was not presented to the courts below"); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (prevailing party may "defend its judgment on any ground *properly raised below* whether or not that ground was relied upon, rejected, or even considered" below) (emphasis supplied); *United States* v. *New York Telephone Co.*, 326 U.S. 638, 651 n.18 (1946) ("whatever its merits," point not made by appellee until case reached Supreme Court will not be considered).

the latter.[3] The pertinent constitutional rule is that a State may tax *no more* than its fair share of interstate commerce; accordingly, a legislature may constitutionally choose *not* to tax a certain type of interstate commerce; but where it *does* tax, it must apportion. This the legislature has not done *at all* with regard to the tax it chose to impose.[4]

b. Even if the tax were in fact based on the "formula" now advanced by the State's lawyers, that formula would not meet the fair apportionment requirement. Indeed, on its face, that "formula" directly and palpably violates the fundamental tenets of a fairly apportioned tax. As the Court held in *Norfolk & Western Railway Co.* v. *Missouri State Tax Commission*, 390 U.S. 317, 325 (1968) (citation omitted), "[a] State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to 'project the taxing power of the state plainly beyond its borders.'" Yet that is precisely what Illinois has done. Ignoring the fact that a substantial part of every interstate communication is necessarily based on activities outside its borders, the State has elected to tax the whole of such activities whenever they happen to have been charged to an Illinois address. This the State may not do.[5]

[3] Appendix to Goldberg Jurisdictional Statement ("GA") 15a.

[4] The fact that the cited apportionment "formula" is an afterthought of counsel rather than a deliberate choice of the legislature is significant in that "the States have wide latitude in the selection of apportionment formulas * * *." *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 274 (1978). Here the State has not "select[ed]" an apportionment formula at all; appellate counsel has created it after the fact. That creation is not entitled to "wide latitude" from this Court; it is entitled to none.

[5] As this Court held in *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 169 (1983), "the factor or factors used in

c. The State and its amici argue that it is reasonable to assume that one-half of all interstate calls in which a State participates will be charged in that State and one-half in others; accordingly, they contend, by taxing 100% of the Illinois-charged calls and 0% of the other calls, the State receives the same revenue it would have received through an apportioned tax on *each* call. State Br. 17; MCI Br. 20. The State and MCI, however, never explain why it is reasonable to assume equality in the aggregate value of interstate calls charged to Illinois and those charged to other States; neither do they point to any legislative determinations or reliable data to support this assumption; and they certainly did not present any evidence on the issue at trial, where the State acknowledged that the tax is completely unapportioned. We would suggest that where, as here, a tax is completely unapportioned on its face, it is the *State's* burden to prove that in practice the tax is effectively apportioned (or, at the very least, to assert that proposition at trial so that plaintiffs have an opportunity to meet it).

We would also suggest that the assumption relied on by the State and MCI is not only counterintuitive, but is shown to be unsound by readily available public documents. The truth is—as information before the FCC demonstrates—that the individual States do *not* have approximately equal values of interstate calls charged instate and out. Rather, as one might expect, in any given period virtually every State—Illinois included—is either a net originator or net terminator of interstate calls by a substantial amount.[6]

the apportionment formula must actually reflect a reasonable sense of how income is generated." Yet, even though a significant portion of the income from every Illinois-charged interstate call is by definition attributable to other States, Illinois taxes it all.

[6] *See* Schedule DMD-1, pp. 2, 4 in 1988 Access Filing Tariff Reference Package on file with the FCC Industry Analysis Branch. The data on this Schedule are taken from filings made annually by

More importantly, even if the State's unfounded, belatedly-introduced assumption were true, it would not render the tax fairly apportioned. The necessary predicate of the State's position is that so long as the State ultimately receives approximately the amount of revenue which a fairly apportioned tax would produce, it does not matter that some (even most) of the various interstate commerce transactions producing the revenues are overtaxed. This reflects a complete misunderstanding of the purpose of the fair apportionment requirement. It is *not* designed as a revenue-raising measure for the States; it is designed to protect interstate commerce. As held in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 447-448 (1979), "[*i*]*n order to prevent multiple taxation of interstate commerce*, this Court has required that taxes be apportioned among taxing jurisdictions, so that *no instrumentality of commerce* is subjected to more than one tax on its full value" (emphasis supplied).[7] The

all interexchange common carriers. The Schedule reflects both the total traffic sensitive minutes of use as well as originating and terminating carrier common line minutes of use for all interexchange carriers from the third quarter of 1986 through the second quarter of 1987.

[7] Illinois' only response to the threat that other States may tax the same calls already taxed by Illinois is that "[t]he Constitution may permit [it], but it seems hard to believe that it requires it," particularly when, in the State's view, there may be instances where taxing a recipient of "unwanted long-distance calls" would be "unfair." State Br. 24. This response misses the point. No one is arguing that the Constitution *requires* other States to tax all calls which Illinois has already taxed in full; neither is it for the courts to decide the extent to which a recipient should be spared a tax on unwanted calls. All such judgments are for the pertinent State legislatures. The point that matters is that those State legislatures would be constitutionally entitled to tax their fair portion of calls which Illinois has already taxed in full. This threat of multiple taxation is sufficient in and of itself to condemn the tax. *See, e.g.*, *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue*, 107 S. Ct. 2810, 2817 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644-645 (1984).

State and its amici apparently believe that *some* instrumentalities of commerce and *some* taxpayers participating in that commerce may be subjected to multiple taxation, so long as other instrumentalities and other taxpayers are subjected to a lesser tax or no tax at all. But commerce and taxpayers cannot lawfully be netted out in that fashion; robbing Peter to pay Paul does not satisfy the constitutional command. Interstate commerce necessarily occurs on a transaction-by-transaction basis, and it is therefore protected by the Constitution on that same basis.[8] As the Court recently explained in *American Trucking Ass'ns* v. *Scheiner*:

> The * * * tax cannot be vindicated * * * simply because it arguably benefits [one] class [of taxpayers] * * * more * * * than another class * * *. As one commentator has observed, "[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens." * * * The [taxes at issue] must stand or fall on their own. [107 S. Ct. 2829, 2843 (1987) (citation omitted).[9]]

[8] We know of no case where the Court has validated a tax that was clearly unconstitutional as to one transaction or entity, on the ground that the State foreswore a constitutional tax on another transaction or entity. For example, the Court stated in *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441 (1964), that "the question" posed by the fair apportionment requirement is "whether the State has executed its power in proper proportion to *the appellant's activities* within the State * * *" (emphasis supplied). Similarly, the Court declared in *Armco Inc.* v. *Hardesty*, 467 U.S. at 642, that "a State may not tax *a transaction or incident* more heavily when it crosses State lines than when it occurs entirely within the State" (emphasis supplied). The focus is on the particular "transaction or incident," not the net revenue raising effect of the tax.

[9] The commentator relied on by the Court in *Scheiner* is Professor Hellerstein in his *State Taxation* treatise. In the same passage

So too here: irrespective of whether or how Illinois chooses to tax interstate calls charged outside Illinois, the State's tax on 100% of the value of all interstate calls charged in Illinois must meet the fair apportionment requirement on its own. As we have shown, it does not.

d. The State and its amici argue at length that the Illinois tax is functionally equivalent to certain State sales and gross receipts taxes upheld by this Court. State Br. 12-16; MCI Br. 9-15. But the taxes they cite are not at all like the present one. With regard to sales taxes, the State and amici rely on cases where this Court approved a tax either on the in-state purchase price of goods that had previously traveled interstate or on the in-state sales of a company that operates interstate.[10] The rationale of such cases and the substance of the taxes they approved have no bearing here. The tax in this case, as both the trial court and the Supreme Court of Illinois determined,[11] is levied on the entirety of every interstate call charged to an Illinois service address; by definition, therefore, the tax falls on the whole of an event which is occurring in at least two States *at once* (the originating and terminating States) and is taxable by both those States. The "practical effect" of such a tax is accordingly not like the sales taxes this Court has approved; *those* taxes, as the Court recently made clear, were upheld because they were laid on a "separate activity con-

of the treatise quoted by the Court, Professor Hellerstein concludes that "both in principle and on practical grounds," the validity of a tax "does not take into account other taxes on other transactions, but limits itself to the transactions at issue." J. Hellerstein, 1 *State Taxation: Corporate Income and Franchise Taxes* ¶ 4.12[5], p. 150 (1983).

[10] *See, e.g., Standard Pressed Steel Co.* v. *Dep't of Revenue*, 419 U.S. 560 (1975); *General Motors Corp.* v. *Washington*, *supra*; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

[11] GA 9a, 20a, 21a, 22a, 24a.

ducted wholly within [a single State] that *no other state has jurisdiction to tax.*" *Tyler Pipe Industries, Inc.* v. *Washington State Department of Revenue,* 107 S. Ct. at 2822 (emphasis supplied). That is simply not true of the present tax.[12]

The gross receipts tax case relied on by the State and its amici—*Moorman Manufacturing Co.* v. *Bair, supra*—is also inapposite. There, the Court held that Iowa could constitutionally apportion its tax on the gross receipts of an interstate vendor of animal feed on the basis of the vendor's sales within Iowa. Even if a similarly-apportioned tax on an interstate communications *carrier* were valid,[13] it certainly does not follow that a sales-based "apportionment" falling on telephone *users* should

[12] As the trial court stated: "Illinois is attempting to tax the entire cost of an interstate act which takes place only partially in Illinois. This tax *by its own terms* is not fairly apportioned." GA 24a (emphasis supplied).

In continuing to insist that the present tax be treated as a sales tax on a wholly in-state activity (State Br. 10 n.3), the State not only ignores the substantive effect of the tax; it also refuses to acknowledge the determination of the Illinois State courts that the incidence of this tax is on the whole of interstate calls, necessarily including the portions occurring outside Illinois. That determination binds not only the State's appellate counsel, but this Court as well. *See Exxon Corp.* v. *Dep't of Revenue,* 447 U.S. 207, 226 n.9 (1980); *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 276 n.2 (1977); *Colonial Pipeline Co.* v. *Traigle,* 421 U.S. 100, 107-108 (1975); *United Air Lines, Inc.* v. *Mahin,* 410 U.S. 623, 628 n.5 (1973); *Aero Mayflower Transit Co.* v. *Bd. of R.R. Comm'rs,* 332 U.S. 495, 499-500 (1947).

[13] It is not at all clear that the Court would or should apply *Moorman* to a sales-based gross receipts tax on an interstate communications carrier. In *Moorman,* in-state sales of a vendor of tangible goods were held to be a fair measure of that vendor's taxable in-state activity. As discussed, however, sales of tangible goods occur wholly within a single State and may for that reason be deemed a fair measure of in-state activity. The same cannot be said of the "sales" of an interstate carrier whose activity is by definition occurring simultaneously in more than one State.

be upheld. Again, the economic substance of the two taxes is radically different. The rationale for upholding a sales-based gross receipts tax on a single interstate company is that the in-state sales fairly measure the company's in-state activities. When all the company's transactions are aggregated, that specific company will be fairly taxed on a state-by-state basis. The same rationale plainly does not apply when a sales-based "formula" falls on an individual telephone user within a given State; obviously, taxing such a user on the full value of the call does not fairly measure the in-state portion of that taxpayer's interstate activity; and just as obviously, the transactions of *individual taxpayer users* cannot be aggregated for Commerce Clause purposes the same way the transactions of a *single entity* can be aggregated. Accordingly, as earlier discussed, even if it were true that when all Illinois telephone users are combined their total interstate telephone tax balances out—because some are taxed at 100% and some are taxed at 0%—this could not validate the 100% tax on some users.[14]

[14] The State also claims that because plaintiffs did not prove the amount of their injury from the tax, their claim must fail. State Br. 32-33. We do not think this contention should be seriously treated. As both lower courts recognized, this tax on 100% of certain interstate commerce is unapportioned on its face. The tax is unquestionably substantially higher than it would be if apportioned, has extracted hundreds of millions of dollars from Illinois taxpayers, and subjects their calls to multiple taxation. It was certainly not plaintiffs' burden at trial, nor is it an appropriate inquiry here, to quantify the precise amount by which the Illinois tax unconstitutionally overcharges the commerce at issue. The only question before this Court is whether the statute as drawn is unconstitutional. If it is, the Court should strike it down, leaving the remedy to the lower courts. As the Court held in *Maryland* v. *Louisiana,* 451 U.S. 725, 759-760 (1981):

> It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination [against interstate commerce], but this is an insufficient

e. The remaining apportionment case relied on by the State and its amici is the Court's recent decision in *D. H. Holmes Co.* v. *McNamara*, 108 S. Ct. 1619 (1988). *Holmes* reviewed the constitutionality of a Louisiana use tax on some mail-order catalogs distributed in-state but purchased out-of-state. In one provision, the statute expressly provided that "there shall be no duplication of the tax," and in another provision extended a credit against the use tax to any taxpayer paying a similar use or sales tax on the same property to another State. The Court found the tax fairly apportioned for two reasons: (1) the State "provides a credit against its use tax for sales taxes that have been paid in other States"; and (2) "Louisiana imposed its use tax only on the 82% of the catalogs distributed in-state; it did not attempt to tax that portion of the catalogs that went to out-of-state customers." 108 S. Ct. at 1623-24. This reasoning supports our position, not the State's. The inescapable and overriding defect in the present tax is that Illinois, unlike Louisiana, has not limited its tax to the portion of interstate commerce occurring "in-state" but has, instead, "attempt[ed] to tax that portion * * * that went to out-of-state customers." [15] It is therefore not fairly apportioned under the rationale of *Holmes*.

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reason for not now declaring the Tax unconstitutional * * *. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.

[15] Moreover, contrary to the State's position (State Br. 26), *Holmes* did *not* reject our view (Goldberg Br. 23-26) that a credit provision, to be effective, should prevent *all* duplicative tax on the commerce, including a tax levied on a different party in the other taxing State. *Holmes* did not even consider that issue. It is true that a credit in the Louisiana statute was specifically extended only to a single taxpayer who paid a tax in both States. But in the sales/use tax situation, that is the only circumstance in which such "duplication of the tax" *could* occur, *i.e.*, that the same taxpayer would pay a sales tax in one State and then be subjected to a use tax in a second State; accordingly, it is not surprising that neither this Court nor the Louisiana statute addressed the circumstance where a second party might be involved in the transaction.

In the case of an interstate telephone call, however, there are *by definition* two parties who could be taxed; accordingly, to prevent duplicative taxation on the commerce a credit must be provided whenever *either* party has paid a second tax. Yet the Illinois statute provides no such credit. Nothing in the language of *Holmes* precludes the need for such a credit. Indeed, that language suggests that the Court assumed that the credit applied in *any* circumstance where duplicative tax might arise: "[t]he Louisiana taxing scheme is fairly apportioned, for it provides a credit * * * for sales taxes that have been paid in other States." *Id.* at 1623. *Accord Tyler Pipe*, 107 S. Ct. at 2821 ("a credit * * * for manufacturing taxes paid other States would presumably cure the discrimination").

f. The last apportionment argument advanced by the State and its amici is based on certain factual assertions made by MCI for the first time in this litigation. MCI contends that "it is virtually impossible to devise an apportionment formula that fairly reflects the involvement of each State affected by every individual interstate telephone call." MCI Br. 16. It furthermore contends that it was plaintiffs' burden at trial "to prove that apportionment is practicable before they could demand that one be made." *Id.* at 19 n.12. It contends, finally, that this Court held in *Scheiner* that "unapportioned taxes 'may be perfectly valid when administrative difficulties make collection of more finely calibrated user charges impracticable * * *.'" MCI Br. 18 (citing 107 S. Ct. at 2847).[16] MCI's legal assertions regarding apportionment are flatly wrong, and its belated factual assertions, even if credited by the Court, do *not* show that no fair method exists to apportion taxes on interstate telephone calls.

This case was decided on cross-motions for summary judgment in the trial court. MCI was a party-defendant in that court and, as did appellant GTE, MCI counterclaimed *against* the State and alleged that:

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[16] The State makes these same arguments and, like MCI, the State stakes those arguments on this Court's considering and accepting MCI's belated factual assertions. See State Br. 16-25.

> The Tax Act does not fairly apportion its tax to services supplied within the State of Illinois since it taxes the entire charge for calls transmitted in interstate commerce. As a consequence, the tax discriminates against interstate commerce, is not fairly related to the services provided by the State, and violates the Commerce Clause of the United States Constitution. [Answer and Verified Counterclaim of Defendant MCI Telecommunications Corporation ¶ 10 at 14.]

MCI did not participate further in the trial court or in the Illinois Supreme Court. GTE, on the other hand, did participate throughout in both those courts and, in support of its summary judgment motion in the trial court, adduced factual evidence (in the form of a sworn affidavit) indicating that GTE has the administrative capability to bill its customers for whatever taxes might be imposed by various States on their apportioned share of interstate calls participated in by that customer.[17] Neither the State nor MCI disputed GTE's claim; neither of them adduced *any* factual evidence on the summary judgment motions; and certainly neither of them made any contentions whatsoever that a call-by-call apportionment of taxes on interstate calls is impossible and therefore not constitutionally required. Rather, as has been explained, the State took the view that the tax did not need to be apportioned because it applied only to a "local" activity; and MCI, of course, asserted that the tax is *not* fairly apportioned and therefore is unconstitutional.

Now, however, both MCI and the State wish to reverse themselves; they ask the Court to accept their untimely contradictions of GTE's properly adduced trial evidence and to credit their broad factual contentions that apportioning taxes on interstate phone calls is "virtually impossible." We submit that this Court should not permit them to try their case for the first time here.[18]

[17] Affidavit of Richard N. Wiley ¶ 14 (reproduced in the appendix to GTE Jurisdictional Statement ("GTE App.") at 9a).

We also submit that MCI is wrong to assert that it is plaintiffs' burden to show not only that a tax is not fairly apportioned, but also that it is feasible to apportion it. We know of no precedent holding or even implying that such a showing is an element of proof in a Commerce Clause claim—and neither MCI nor the State cites any such precedent. Where, as here, a plaintiff shows a tax to be unapportioned on its face, the tax has necessarily already failed the constitutional test imposed by *Complete Auto*. A plaintiff need show no more.[19] If *the State*

[18] As is true under the Federal Rule governing summary judgment, the counterpart Illinois Rule (Code of Civ. Proc. § 2-1005) has been construed to require the nonmoving party to come forward *at trial* with factual evidence to support any claim it makes as to a material disputed fact, particularly where, as here, the movant has supported its claim by affidavit. See "Supplement to Historical and Practice Notes" to § 2-1005 at 23 (1988). The State and MCI did not act in accordance with this rule. In any event, this Court decides cases on the basis of the record properly before it, not on the basis of new factual materials never presented to or considered by the lower courts. *See, e.g., Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267, 278 n.5 (1986) (Powell, J.).

[19] By the same token, and again contrary to the State's position, where a tax is unapportioned, a plaintiff certainly has no burden to prove that the unapportioned tax produces "grossly distorted results." State Br. 12. That might be true, as in *Moorman*, if a State had adopted an imprecise formula for apportionment which the Court nevertheless deemed fair. But this is not such a case. As the Court said in *Japan Line* in distinguishing *Moorman*:

> In *Moorman*, the problem arose, not from lack of apportionment, but from mathematical imprecision in apportionment formulae. * * * This case, by contrast, involves no mere mathematical imprecision in apportionment; it involves a situation where true apportionment does not exist and cannot be policed by this Court at all. [441 U.S. at 455.]

Precisely the same is true here. A tax on interstate commerce that is unapportioned fails *Complete Auto*; no further evidence of its unconstitutionality need be shown.

believed that apportionment is not possible for some reason, it could have *defended* on that ground at trial. But the State did not do so; again, it should not be permitted to raise that factually-based defense (and assert evidence thereon) for the first time before this Court.

Moreover, and perhaps most importantly, even if the Court were willing to entertain that defense and credit the factual claims now advanced by MCI, those claims do *not* show that Illinois has no practical method available for apportioning its tax on individual calls charged in Illinois. At most, MCI's claims reflect technological difficulty in determining the precise movement of each call *between* the originating and terminating States and in assessing the relative contribution made to that movement by the *intervening* States. *See* MCI Br. 2-3, 7-8, 16-17. Indeed, the essence of MCI's brief is that "MCI believes that it is literally impossible at the present time to meaningfully apportion the charge for a particular call *among the States through which that call was transmitted*, for there is no way to ascertain the identities of those States." *Id.* at 2 (emphasis supplied). Even if MCI's "belief" on this point were correct, it does not follow that *no* fair apportionment is possible. Indeed, one simple mechanism for accomplishing that apportionment is readily available and is suggested by MCI's own claims.[20]

If MCI is correct that the identities of the States participating in the intervening transmission of each call are unknowable, then obviously no intervening State could have nexus to tax the call. There would certainly be no nexus in the case of those calls which MCI says move by satellite "without passing through any State other than the States of origination * * * and termination." MCI Br. 2. And, according to the State, even in

[20] Other available methods for fairly apportioning the tax are described in GTE Sprint's Reply Brief.

the case of non-satellite calls, the "limited contact between the telecommunication and the intervening states makes it uncertain whether the intervening states would possess nexus to tax the call at all * * *." State Br. 19-20. If the State and MCI are right in these claims, it simply means that as to each such interstate call, only the originating and terminating States may constitutionally tax the call; and, even if no other method for apportioning the tax between those two States were available, obviously a 50% apportionment between them could be selected as a "rough approximation"[21] of their relative participation in the interstate commerce.[22] And, just as obviously, a 100% apportionment to Illinois cannot by *any* measure be deemed fair. Such an "apportionment" should not be approved by this Court.

2. Discrimination

Having devoted most of their briefs to the fair apportionment requirement, neither the State nor its amici give much attention to the nondiscrimination requirement of *Complete Auto.* What attention they do give is largely a repetition of their arguments concerning fair apportionment and, significantly, they fail even to address our contention that *Scheiner* is dispositive on the discrimination question.

[21] This Court has often indicated that a tax may be based on a "rough approximation" of a State's participation in interstate commerce, particularly where precise, finely-tuned calibrations are not available. *American Trucking Ass'ns* v. *Scheiner*, 107 S. Ct. at 2847 n.26 & cases cited therein. But contrary to MCI's claim, this Court has never held—and it certainly did not hold in *Scheiner*—that a totally unapportioned tax is permissible even where a "rough approximation" for a fair apportionment is available.

[22] Permitting the originating and terminating States together to tax the whole of the call is further supported by the well-known fact, documented in the National Conference amici brief, that the bulk of the charge for interstate calls is attributed to services at either end of the calls, not to the intervening transmission. NC Br. 8-9.

a. We showed in our initial brief that the inevitable "practical effect" of laying the same 5% tax on the gross charge for interstate and intrastate calls alike is to levy a higher effective charge on interstate calls for the same (or lesser) in-state activity. This result, we said, is "plainly discriminatory" under *Scheiner*.[23] The State and its amici do not deny that this discrimination is inherent in the statute. Instead, they say that even though the State may have assessed a higher effective tax for interstate calls charged in Illinois (say a Chicago to Gary call charged to Chicago), it must be assumed that someone, sometime will make a corresponding interstate call that will not be taxed by Illinois at all (say a Gary to Chicago call charged to Gary). State Br. 27-28. This, of course, is the same argument the State made regarding fair apportionment and it should be rejected for the same reason: the Constitution does not permit a State to discriminatorily tax *some* interstate commerce and *some* taxpayers participating in that commerce, on the ground that other commerce and other taxpayers are not assessed at all. *See Scheiner*, 107 S. Ct. at 2842-43.[24]

b. The State also seeks to defend its flat-rate tax on the basis of two other decisions of this Court—*Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981) and *Container Corp., supra*. *Commonwealth Edison*, according to the State, prohibits discrimination *only* where it consists of a penalty levied on commerce for crossing State lines; hence, because there is "no evidence" that "the cost of a long-distance call * * * has anything to do with crossing State lines," charging a higher effective rate for interstate calls is permissible. State Br. 27-28. It is undeniable, however, that interstate phone calls charged in Illinois cross State lines. It is also undeniable that part of the tax received by Illinois for such calls is derived from activities across its State lines. It is therefore inescapable that, as was true in *Scheiner*, Illinois is charging a higher effective rate on the in-state component of *interstate* commerce than on the comparable in-state component of *intrastate* commerce.[25] Whether or not Illinois did this purposefully to discriminate against interstate commerce, the "free trade among the several States" which the Commerce Clause protects is damaged all the same. *Commonwealth Edison*, 453 U.S. at 618.[26]

[23] Goldberg Br. 30-33 (quoting *Scheiner*, 107 S. Ct. at 2841). We also explained that the more costly the call, the greater the discrimination. Goldberg Br. 32 n.27.

[24] For its part, the National Conference refuses to acknowledge that there is even *some* discrimination under the statute, even as to individual calls. Indeed, National Conference does not even mention *Scheiner*. Instead, it finds dispositive that the Court in *Holmes* deemed the Louisiana use tax to be nondiscriminatory and that the Court relied on the State's use-tax rate being "equal" to its sales-tax rate. NC Br. 18-19. Once again, this ignores the substantive distinctions among the taxes at issue. There is no difference in practical effect when the same mail-order catalogs are subjected to either a 5% use tax or a 5% sales tax. But if Illinois lays an "equal" 5% tax on both a \$5.00 Chicago-Los Angeles and a \$1.00 Chicago-Joliet call, it necessarily has not treated the calls "equally" in proportion to their in-state activity.

[25] It is furthermore well known, and was expressly established by GTE's affidavit at trial, that "[t]he basic charge for an interstate toll varies according to the distance between the place the call originates and the place it terminates, *increasing in price as the distance between these points increases*." Wiley Affidavit ¶ 12 (GTE App. at 9a). Accordingly, contrary to the State's claim, costs of calls do in fact respond to the crossing of State lines; and, necessarily, the more lines a given call crosses, the greater will be the cost, and the higher will be Illinois' tax.

[26] The State's reliance on *Container Corp.* is equally unpersuasive. Again, rather than deal with the "practical effect" test for discrimination described in *Scheiner*, the State seeks to apply a test it believes it can pass—the "internal/external" test of *Container Corp*. See State Br. 32-33. Even assuming that test were applicable, the State fails it. The "more difficult requirement" of that test requires that a State's tax be apportioned in such a way as to "actually reflect a reasonable sense of how income is generated." 463 U.S. at 169. Illinois' tax does not begin to do this. The tax on

c. The State's final argument with regard to discrimination addresses the risk of multiple taxation to which Illinois' interstate calls—but not its intrastate calls—are subject.[27] The State claims that multiple taxation is constitutionally permitted where a State appropriately apportions its tax under *Moorman*. State Br. 30. While a tax fairly apportioned in accordance with *Moorman* may well avoid an unconstitutional risk of multiple taxation, we have already shown that the Illinois tax is *not* fairly apportioned in accordance with *Moorman*—or in accordance with any other case—and is in fact discriminatory.

3. Fair Relation

The Illinois tax violates not only the fair apportionment and nondiscrimination requirements, but also the requirement that the tax's "measure" be related to "the taxpayers' presence or activities in [the] State." *Commonwealth Edison*, 453 U.S. at 629. In essence, the State's and amici's only response to this violation is to cite *Holmes* and to declare that the full value of interstate calls *is* an appropriate "measure" for the taxpayer's in-state activities. See State Br. 34-36; NC Br. 20-22. But this case is not like *Holmes*; there, as was also true in *Commonwealth Edison*, the *full value* of the taxed activity occurred *in-state*. Recognizing this distinction, the State contends:

Illinois-charged interstate calls is not apportioned *at all* between the in-state and out-of-state income generated by those calls. Accordingly, the tax by definition accomplishes precisely what *Container Corp.* forbids—it attributes telephone-call income to Illinois that is "'out of all appropriate proportion to the business transacted * * * in that State.'" *Id.* at 170 (quoting *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 135 (1931)).

[27] As we explained in our initial brief, this Court's cases have identified two prohibited kinds of discrimination under the Commerce Clause—the kind that subjects interstate commerce to a higher effective rate for in-state services and the kind that subjects that commerce to multiple taxation to which intrastate commerce is not subject. See Goldberg Br. 30-33.

> Here, there is at least one party, the taxpayer, present in Illinois for the duration of the taxed call, and, * * * [the tax] is measured by what he is willing to pay for the call. Nothing could be more closely related to the taxpayer's activity in Illinois. The fourth prong of *Complete Auto* is thus satisfied. [State Br. 34-35.]

This analysis misconstrues the purpose of the fair-relation prong of *Complete Auto*. As the Court explained in *Commonwealth Edison*, the reason that the "measure" of the tax must be related to the taxpayer's in-state activities is to ensure that the tax will be "tied to the *earnings which the State * * * has made possible * * *.*" *Commonwealth Edison*, 453 U.S. at 626 (quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 446 (1940) (emphasis supplied)). The Court recently reaffirmed this proposition in *Scheiner*, indicating that the axle taxes in that case violated the fair-relation requirement because they did not "vary directly with miles traveled or with some other proxy for *value obtained from the State*." 107 S. Ct. at 2844 (emphasis supplied).[28]

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[28] In its final refusal to analyze the substantive effect of this tax, the State argues that *Scheiner's* application of the fair-relation requirement need not be followed here because the *Scheiner* tax was denominated a "user fee." According to the State, where a "user fee" is at issue "it may be appropriate to require that the measure of the tax bear some relationship to the services provided by the State, but the same requirement is neither needed nor imposed for general revenue taxes." State Br. 8. But *Complete Auto's* requirements are not avoided by changing the name of the tax and nothing in this Court's cases indicates that the fair-relationship requirement is inapplicable to "general revenue taxes." Rather, this Court is committed to the view that its "duty" in a Commerce Clause case is to determine the "practical operation" of the tax under attack, "whatever its name may be." *Maryland* v. *Louisiana*, 451 U.S. at 756. (Moreover, if the way Illinois has categorized the tax were significant, the Court should be aware that the tax has been denominated, among other things, "a use tax, *i.e.*, use of a privilege." GA 8a.)

Here, the tax is not measured either by earnings Illinois has made possible or by value obtained from the State; rather, a substantial part of the earnings and value that Illinois taxes are necessarily derived out of State. Worse, the greater those out-of-state earnings and values, the higher the Illinois tax. Such a tax is not "fairly related" to the taxpayer's in-state activities or to the protection Illinois has extended to those activities. Indeed, it is inversely related to them.

CONCLUSION

For the foregoing reasons, and those stated in our initial brief, the judgment below should be reversed.

Respectfully submitted,

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